IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 226 OF 2005.

1. Mr.Nalin Vadilal Parekh,

2. Mr.Franklin D'Souza,

3. Mr.Kashinath Gondhali,

4. Mr.Laxman Bhaurao Mali,

5. Mr.Denzil Ceruvathoor John. ... Appellants.

V/s.

M/s.Hindustan Lever Limited. ... Respondent.

Mr.Rohit Kapadia, senior counsel with Ms.Soma Singh and Ms.Jyoti Ghag i/b. M/s.Thakore Jariwala and Associates for the appellants.

Mr.Navroz Seervai, senior counsel with Mr.Zubin Dalal i/b. Crawford Bayley and Co. for the respondent.

CORAM : A.S.Oka, J.

DATED : 1st March, 2005.

ORAL ORDER :

. Heard the learned counsel for the parties.

2. The challenge in this Appeal from Order preferred by the original plaintiffs is to the judgment and order dated 27th January 2005 by which notice of motion taken out by the Appellants-Plaintiffs has been dismissed by the learned trial Judge.

3. The Appellants-Plaintiffs filed a suit in the City Civil Court, Mumbai praying for following reliefs:

(a) that this Honourable Court be pleased to grant a declaration that the Notice issued under Section 192A(2) of the Companies Act calling by way of ordinary resolution of General Body of Shareholders to grant sanction for sale, lease or otherwise disposal of the undertaking in the manufacture of soaps and soap intermediates situated at Haji Bunder, Sewri, Bombay (Maharashtra) to one of the subsidiaries of the Defendant Company, is illegal, bad-in-law, liable to revoked, cancelled, set aside and be not acted upon;

(b) that this Honourable Court be pleased to grant a permanent order and injunction restraining the Defendants, their servants, agents, representatives and/or persons acting through or under them from selling, leasing or otherwise disposal of the undertaking in the manufacture of soaps and soap intermediates situated at Haji Bunder, Sewri, Bombay (Maharashtra) to one of the subsidiaries of the Defendant Company;

The case of the Appellants is that they are the shareholders of the Respondent Company. There is a notice issued by the Respondent Company under section 192A(2) of the Companies Act, 1956 (hereinafter referred to as the "said Act of 1956). According to the Appellants, along with the notice the Respondent Company has issued a statement disclosing its intention to transfer one of the undertakings of the Respondent. The case of the

Appellants - Plaintiffs is that in the notice under section 192A(2) of the said Act of 1956 and in the explanatory statement and the reasons for the proposed resolution under section 293(1)(c) of the said Act of 1956, the Respondent Company has not disclosed the material particulars. According to the Appellants, the order passed by the Industrial Tribunal is not disclosed in the said notice and the explanatory statement. The allegation of the Appellants-Plaintiffs is that the Respondent has not disclosed filing of an Appeal before the Division Bench of this Court. Various details such as names of the subsidiary to which the unit will be transferred and what stakes the Respondent Company will have in the said subsidiary are not disclosed in the explanatory statement. The contention of the Appellants-Plaintiffs is that under section 173(2) of the said Act of 1956 the Respondent Company was under obligation to disclose all material facts which are necessary for the shareholders to form an independent opinion on the basis of the facts placed before them so that they are able to take appropriate decision. According to the Appellants, the material facts would comprise the reasons for the sale of the subsidiary, the name of the company to whom the sale is proposed to be made and whether the sale is in the interest of the Company and the

Directors. The Appellants have relied upon letter dated 13th December 2004 sent to the Company Secretary of the Respondent Company in which certain queries have been made. Reliance is also placed on further letter dated 26th December 2004 sent by the Appellants. It is contended that in the reply dated 21st December 2004 no details have been disclosed by the Respondent Company.

4. The notice of motion was taken out in the pending suit praying for following reliefs:

> (a) that this Honourable Court be pleased to grant a temporary order and injunction restraining the Defendants, their servants, agents, representatives and/or persons acting through or under them from selling, leasing or otherwise disposal of the undertaking in the manufacture of soaps and soap intermediates situated at Haji Bunder, Sewri, Bombay (Maharashtra) to one of the subsidiaries of the Defendant Company.

5. The notice of motion was contested by the Respondent by filing affidavit in reply. The first challenge in the affidavit in reply is to the jurisdiction of the trial Court to entertain the suit. The challenge is also to the pecuniary jurisdiction of the trial Court. A case is made out that the Appellants-Plaintiffs are the employees of the Respondent Company and they are trying to

agitate their industrial rights by filing the suit. It is stated that the Appellant Nos.1, 2, 3 and 5 are the office bearers of the Union and Appellant No.4 was a workman of the concerned closed unit of the Respondent Company whose services have been terminated. It is stated by the Respondent that postal ballot process has been concluded and majority of 94% of the shareholders have voted in favour of resolution. It is stated that the explanatory statement annexed to the notice gives full and complete details in terms of the legal requirements and are much more elaborate than the mercantile practice followed in this regard. The Respondent also dealt with various other factual aspects pleaded by the Appellants-Plaintiffs. There is a rejoinder filed by the Appellants in which apart from the facts set out it is contended that the proposed sale is not in the interest of the Respondent Company.

6. By the impugned judgment and order, the learned trial Judge decided both the issues framed on the question of jurisdiction in favour of the Appellants-Plaintiffs. There is no challenge to the findings recorded by the trial Court on the said issues and, therefore, I am not dealing with the same. The learned trial Judge held that the

Appellants failed to prove prima facie case. Learned Judge also held that as the resolution has been approved by strong majority of 94% of the shareholders, the balance of convenience was in favour of the Respondent Company. Even on point of irreparable loss the learned trial Judge has held in favour of the Respondent Company.

7. Shri Kapadia, learned senior counsel appearing for the Appellant has taken me through the material averments in the plaint. He has invited my attention to the explanatory statement to the resolution. He submitted that the explanatory statement is not complete and the particulars given therein are not sufficient for the shareholders to form an opinion. He pointed out that even the name of the buyer is not disclosed and the price at which sale transaction is proposed to be made is also not disclosed. He invited my attention to the advertisement issued by the Respondent on 17th February 2005 which shows that the transfer of property in dispute is intended to be made to Bon Ltd. which is a wholly owned subsidiary of the Respondent Company. He submitted that looking to the precarious financial condition of the said subsidiary, the sale will not be in the interest of the Company. He has relied upon the judgment of the

learned single Judge of this Court in A.I.R. 1972 Bombay page 276 (**L.C.Kapadia v. L.B.Desai**). He has also placed reliance on the judgment of the Company Law Board reported in (2000) 3 Comp.LJ 129 (CLB) (**B.A.Mendonca v. Philips India Ltd.**) and submitted that he is adopting the reasoning given by the Company Law Board as his submissions.

8. Shri Seervai, learned senior counsel appearing for the Respondent has invited my attention to the explanatory statement and submitted that all material particulars have been stated in the statement. Shri Seervai has taken me through the relevant provisions of the said Act of 1956. He has invited my attention to section 291 of the said Act of 1956. He has also relied upon the provisions of section 293(1)(a) of the said Act, 1956 in support of his submissions. He submitted that under section 293(1)(a) the Board of Directors is under obligation to obtain consent in the General Meeting to sell or to lease or otherwise to dispose of the undertakings of the Company and he submitted that this is a limited exception carved out to the powers of Board of Directors under section 291 of the said Act of 1956. Mr.Seervai also relied upon the judgment of the learned single Judge of the Gujarat High Court in the case of 1964 (Vol.XXXIV) Company

Cases 777 (**S.M.Ganpatram v. Sayaji Jubilee Cotton & Jute Mills Co.**)

9. I have considered the rival submissions. The present Appeal is preferred under order XLIII rule 1(r) of the Code of Civil Procedure, 1908 ("C.P.C." for short). In so far as the scope of the appeal under this section is concerned, the law laid down by the Apex Court is well settled. In the judgment of the Apex Court in 1990 (supp) SCC 727 (**Wander Ltd. v. Antox India P.Ltd.**) the Apex Court held that the Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely. The Apex Court held that an Appeal against exercise of discretion is said to be an Appeal on principle and, therefore, the Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. Keeping in mind the limited scope of power in an appeal under order XLIII rule 1(r) of the C.P.C. the submissions will have to be considered.

10. Shri Kapadia has invited my attention to paragraph No.34 of the decision in the case of **L.C.Kapadia** (supra). The said para reads thus:

> "34. Now, I ;may sum up what emerges from these various authorities cited by Mr.Thakkar. Bearing in mind the object of the legislature, I must say that Section 173 is mandatory and not directory. It is in the interest of the general body of Share-holders that the legislature has made provisions in Section 173(2) requiring the notice of a meeting to set out a statement containing all material facts concerning each special item of business. A notice of meeting when it contains items of special business within the meaning of Section 173(1)(b) must disclose all the material facts. All the share-holders must be in a position to make up their mind in advance whether they will attend the meeting or leave it to the good sense of the majority at the meeting. Any non-compliance with this requirement will nullify the action taken at the meeting. While considering the efficacy of any such notice, a benevolent construction will not be adopted so as to defeat the provisions of the statute. It is also clear that whether or not a particular notice or an explanatory statement in given case complies with the statutory requirements is a question of fact. There are two ways in which the mandatory provisions contained in Section 173 may be contravened. It may be a case where no explanatory statement is at all appended to the item of special business or it may be a case where the statement is incomplete, missing or tricky. The contravention may be the result of an act of omission or an act of commission. Whatever be the nature of the contravention, the question always is a mixed question of fact and law. When a challenge is made in court of law the court will have to consider all the facts and circumstances of the case and then decide one way or the other.

He has also relied upon the judgment of the learned single Judge of this Court in 1971 (vol.41) Company Cases 377 (**Firestone Tyre and Rubber Co. v. Synthetics & Chemicals Ltd.**) wherein same principles have been laid down. The learned single Judge in the case of **L.C.Kapadia** (supra) has held that the notice of meeting when it contains items of special business within the meaning of section 173(1)(b) must disclose all the material facts so that all the shareholders must be in a position to make up their mind in advance whether they will attend the meeting or leave it to the good sense of the majority at the meeting. There cannot be any dispute about the proposition of law. The learned trial Judge has referred to the explanatory statement and to the notice under section 192A(2) of the said Act of 1956. After examining the explanatory statement, learned trial Judge has held that the explanatory statement contains all the material particulars.

11. It is, therefore, necessary to refer to the explanatory statement. Necessary details regarding production in the said undertaking during the last three years are incorporated in the said statement. The reasons for the proposed sale of the unit are also set out in detail. It is also stated that the proposed transfer of the said undertaking/subsidiary

will facilitate the operations of the said unit becoming transparent on a stand-alone basis. After giving all details it is stated that it would be in the interest of the Company and the concerned employees to transfer the said undertaking as referred to in the draft ordinary resolution.

12. It is to be noted that it is not the case of the Appellants that on the date on which the notice was issued a decision was taken to sell the undertaking or to transfer the undertaking to a particular named subsidiary. It is also not the case of the Appellants that even the price at which or consideration for which the transfer is to be effected was determined by the Board of Directors. Prima facie it appears to me that all the material particulars which could have been made available on the date of issuance of the notice have been incorporated in the explanatory statement. Prima facie, the particulars which are set out in the explanatory statement are in conformity with law laid down by this Court in the case of **L.C.Kapadia** (supra)

13. In so far as the submission of the learned counsel for the Appellants regarding precarious financial condition of the Bon Ltd., it must be

noted here that nothing is placed on record of this Appeal by making an Application for production of additional evidence. A chart showing financial condition of the said subsidiary is tendered across the bar. As no application has been made for production of additional evidence, there was no opportunity for the Respondent Company to meet the said documents which were sought to be tendered at bar. Therefore no reliance can be placed on the said documents.

14. As stated earlier, the learned trial Judge has recorded a finding in paragraph-26 of the impugned order which reads thus:

> "..... **125, 72, 75, 595** votes were came in favour of the resolution whereas **7, 85, 79, 774** votes were came against the resolution and thereby pointed out that majority of **94%** of shareholders have approved the above resolution and the process of taking consent of shareholders is now complete....."
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> (emphasis supplied)

The said finding recorded by the trial Court is not disputed by the Appellants at this stage. If 94% of the shareholders have approved the resolution, the learned trial Judge was right in coming to the conclusion that the balance of convenience was in favour of the Respondent Company.

15. After having considered the submissions of the learned counsel appearing for the parties and after having perused the findings recorded by the leaned trial Judge I am of the view that all relevant documents have been considered by the learned trial Judge and prima facie findings have been recorded. There is no perversity in the findings. As stated earlier grant of temporary injunction is an equitable relief and in the face of approval granted by 94% of the shareholders, no fault can be found with the approach of the learned trial Judge if he declined to grant temporary injunction.

16. In this view of the matter, there is no merit in the Appeal and the same is dismissed with no order as to costs.

17. It is obvious that the findings which are recorded by the trial Court as well as by this Court are tentative findings recorded for the limited purpose of grant of interim relief.

18. It is also obvious that as the suit is pending, all further actions of the Respondent will be subject to the final outcome of the suit.

19. All the concerned parties to act on an authenticated copy of this order.

20. At this stage learned counsel appearing for the Appellants prays that ad-interim order passed by this Court on 16th February 2005 may be continued for a reasonable time. The said request is strongly opposed by the learned counsel appearing for the Respondent.

21. Considering the enormous pressure on the Court Stenographers it will take long time to transcribe the judgment. In view of this position, ad-interim order dated 16th February 2005 will continue to operate for a period of six weeks from today.

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